under rule 4.10(a). Unless the Commission determines that earlier disposition is necessary, the request shall remain on the public record for thirty (30) days after a press release on the request is issued. Bureau Directors are authorized to publish a notice in the FEDERAL REGISTER announcing the receipt of a request to reopen at their discretion. The public is invited to comment on the request while it is on the public record.

(d) *Determination.* After the period for public comments on a request under this section has expired and no later than one hundred and twenty (120) days after the date of the filing of the request, the Commission shall determine whether the request complies with paragraph (b) of this section and whether the proceeding shall be reopened and the rule or order should be altered, modified, or set aside as requested. In doing so, the Commission may, in its discretion, issue an order reopening the proceeding and modifying the rule or order as requested, issue an order to show cause pursuant to §3.72, or take such other action as is appropriate: *Provided, however,* That any action under §3.72 or otherwise shall be concluded within the specified 120-day period.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552))

[45 FR 36344, May 29, 1980, as amended at 46 FR 26291, May 12, 1981; 47 FR 33251, Aug. 2, 1982; 50 FR 53305, Dec. 31, 1985; 53 FR 40868, Oct. 19, 1988; 65 FR 50637, Aug. 21, 2000]

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

Sec.

Subpart B—Pleadings

Subpart C—Prehearing Procedures; Motions; Interlocutory Appeals; Summary Decisions

Subpart D—Discovery; Compulsory Process

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Subpart F—Decision

Subpart G [Reserved]

Subpart H—Reopening of Proceedings

AUTHORITY: 15 U.S.C. 46, unless otherwise noted.

SOURCE: 32 FR 8449, June 13, 1967, unless otherwise noted.

Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

§3.1 Scope of the rules in this part.

The rules in this part govern procedure in adjudicative proceedings. It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each state of a proceeding to avoid delay.

§3.2 Nature of adjudicative proceedings.

Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term includes hearings upon objections to orders relating to the promulgation, amendment, or repeal of rules under sections 4, 5 and 6 of the Fair Packaging and Labeling Act and proceedings for the assessment of civil penalties pursuant to §1.94 of this chapter. It does not include other proceedings such as negotiations for the entry of consent orders; investigational hearings as distinguished from proceedings after the issuance of a complaint; requests for extensions of time to comply with final orders or other proceedings involving compliance with final orders; proceedings for the promulgation of industry guides or trade regulation rules; proceedings for fixing quantity limits under section 2(a) of the Clayton Act; investigations under section 5 of the Export Trade Act; rulemaking proceedings under the Fair Packaging and Labeling Act up to the time when the Commission determines under §1.26(g) of this chapter that objections sufficient to warrant the holding of a public hearing have been filed; or the promulgation of substantive rules and regulations, determinations of classes of products exempted from statutory requirements, the establishment of name guides, or inspections and industry counseling, under sections 4(d) and 6(a) of the Wool Products Labeling Act of 1939, sections 7, 8(b), and 8(c) of the Fur Products Labeling Act, and sections 7(c), 7(d), and 12(b) of the Textile Fiber Products Identification Act.

[45 FR 67319, Oct. 10, 1980]

Subpart B—Pleadings

§3.11 Commencement of proceedings.

(a) *Complaint.* Except as provided in §3.13, an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.

(b) *Form of complaint.* The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the time and place for hearing, the time to be at least thirty (30) days after service of the complaint.

(c) *Motion for more definite statement.* Where the respondent makes a reasonable showing that it cannot frame a responsive answer based on the allegations contained in the complaint, the respondent may move for a more definite statement of the charges against

it before filing an answer. Such a motion shall be filed within ten (10) days after service of the complaint and shall point out the defects complained of and the details desired.

[32 FR 8449, June 13, 1967, as amended at 43 FR 11978, Mar. 23, 1978; 50 FR 53305, Dec. 31, 1985]

§ 3.11A Fast-track proceedings.

(a) *Scope and applicability.* This section governs the availability of fast-track procedures in administrative cases where the Commission files a collateral federal district court complaint that seeks preliminary injunctive relief against some or all of the conduct alleged in the Commission's administrative complaint. The Commission will afford the respondent the opportunity to elect such fast-track procedures, subject to the conditions set forth in paragraph (b)(1) of this section, in cases that the Commission designates as appropriate. In cases so designated, the Commission will provide written notice to each respondent at the time that it is served with the Commission's federal district court complaint for preliminary injunctive relief. Except as modified by this section, the rules contained in subparts A through I of part 3 of this chapter will govern fast-track procedures in adjudicative proceedings. Discovery will be governed by subpart D of this part, and the Administrative Law Judge may exercise his plenary authority under § 3.42(c)(6) to establish limitations on the number of depositions, witnesses, or any document production.

(b)(1) *Conditions.* In cases designated as appropriate by the Commission pursuant to paragraph (a) of this section, a respondent may elect fast-track procedures:

(i) if a federal court enters a preliminary injunction against some or all of the conduct alleged in the Commission's administrative complaint; or,

(ii) where no such injunction is entered, if the Commission determines that the Federal court proceeding has resulted in an evidentiary record that is likely materially to facilitate resolution of the administrative proceeding in accordance with the expedited schedule set forth in this section. The Commission will provide each respondent with written notice of any such determination.

(2) *Election.* A respondent that determines to elect fast-track procedures shall file a notice of such election with the Secretary by the latest of: three days after entry of a preliminary injunction as described in paragraph (b)(1)(i) of this section; three days after the respondent is served with notice of the Commission's determination under paragraph (b)(1)(ii) of this section; or three days after the respondent is served with the Commission's administrative complaint in the adjudicative proceeding. In proceedings involving multiple respondents, the fast-track procedures set forth in this section will not apply unless the procedures are elected by all respondents.

(c) *Deadlines in fast-track proceedings.* (1) For purposes of this paragraph, ''triggering event'' means the latest of: entry of a preliminary injunction as described in paragraph (b)(1)(i) of this section; service on the last respondent of notice of the Commission's determination under paragraph (b)(1)(ii) of this section; service on the last respondent of the Commission's administrative complaint in the adjudicative proceeding; or filing with the Secretary by the last respondent of a notice electing fast-track procedures.

(2) *Proceedings before the Administrative Law Judge.* In fast-track proceedings covered by this section:

(i) The scheduling conference required by § 3.21(b) shall be held not later than three days after the triggering event.

(ii) Respondent's answer shall be filed within 14 days after the triggering event.

(iii) The Administrative Law Judge shall file an initial decision within 56 days following the conclusion of the evidentiary hearing. The initial decision shall be filed no later than 195 days after the triggering event.

(iv) Any party wishing to appeal an initial decision to the Commission shall file a notice of appeal with the Secretary within three days after service of the initial decision. The notice shall comply with § 3.52(a) in all other respects.

(v) The appeal shall be in the form of a brief, filed within 21 days after service of the initial decision, and shall comply with §3.52(b) in all other respects. All issues raised on appeal shall be presented in the party's appeal brief.

(vi) Within 14 days after service of the appeal brief, the appellee may file an answering brief, which shall comply with §3.52(c). Cross-appeals, as permitted in §3.52(c), may not be raised in an appellee's answering brief.

(vii) Within five days after service of the appellee's answering brief, the appellant may file a reply brief, in accordance with §3.52(d) in all other respects.

(3) *Proceedings before the Commission.* In fast-track proceedings covered by this section, the Commission will issue a final order and opinion within 13 months after the triggering event. If the adjudicative proceeding is stayed pursuant to a motion filed under §3.26, the 13-month deadline will be tolled for as long as the proceeding is stayed. The Commission may extend the date for issuance of the Commission's final order and opinion in the following circumstances: if necessary to permit the Commission to provide submitters of *in camera* material or information with advance notice of the Commission's intention to disclose all or portions of such material or information in the Commission's final order or opinion; or if the Commission determines that adherence to the 13-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondent's election of fast-track procedures.

[63 FR 7527, Feb. 13, 1998]

§3.12 Answer.

(a) *Time for filing.* A respondent shall file an answer within twenty (20) days after being served with the complaint; *Provided, however,* That the filing of a motion permitted under these Rules shall alter this period of time as follows, unless a different time is fixed by the Administrative Law Judge:

(1) If the motion is denied, the answer shall be filed within ten (10) days after service of the order of denial or thirty (30) days after service of the complaint, whichever is later;

(2) If a motion for more definite statement of the charges is granted, in whole or in part, the more definite statement of the charges shall be filed within ten (10) days after service of the order granting the motion and the answer shall be filed within ten (10) days after service of the more definite statement of the charges.

(b) *Content of answer.* An answer shall conform to the following:

(1) *If allegations of complaint are contested.* An answer in which the allegations of a complaint are contested shall contain:

(i) A concise statement of the facts constituting each ground of defense;

(ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted.

(2) *If allegations of complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the complaint, his answer shall consist of a statement that he admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings and conclusions under §3.46 and the right to appeal the initial decision to the Commission under §3.52.

(c) *Default.* Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the complaint and to authorize the Administrative Law Judge, without further notice to the respondent, to find the facts to be as alleged in the complaint

and to enter an initial decision containing such findings, appropriate conclusions, and order.

[32 FR 8449, June 13, 1967, as amended at 50 FR 53305, Dec. 31, 1985; 61 FR 50646, Sept. 26, 1996; 66 FR 17628, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

§ 3.13 Adjudicative hearing on issues arising in rulemaking proceedings under the Fair Packaging and Labeling Act.

(a) *Notice of hearing.* When the Commission, acting under §1.26(g) of this chapter, determines that objections which have been filed are sufficient to warrant the holding of an adjudicative hearing in rulemaking proceedings under the Fair Packaging and Labeling Act, or when the Commission otherwise determines that the holding of such a hearing would be in the public interest, a hearing will be held before an Administrative Law Judge for the purpose of receiving evidence relevant and material to the issues raised by such objections or other issues specified by the Commission. In such case the Commission will publish a notice in the FEDERAL REGISTER containing a statement of:

(1) The provisions of the rule or order to which objections have been filed;

(2) The issues raised by the objections or the issues on which the Commission wishes to receive evidence;

(3) The time and place for hearing, the time to be at least thirty (30) days after publication of the notice; and

(4) The time within which, and the conditions under which, any person who petitioned for issuance, amendment, or repeal of the rule or order, or any person who filed objections sufficient to warrant the holding of the hearing, or any other interested person, may file notice of intention to participate in the proceeding.

(b) *Parties.* Any person who petitions for issuance, amendment, or repeal of a rule or order, and any person who files objections sufficient to warrant the holding of a hearing, and who files timely notice of intention to participate, shall be regarded as a party and shall be individually served with any pleadings filed in the proceeding. Upon written application to the Administrative Law Judge and a showing of good cause, any interested person may be designated by the Administrative Law Judge as a party.

[32 FR 8449, June 13, 1967, as amended at 40 FR 33969, Aug. 13, 1975]

§ 3.14 Intervention.

(a) Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor. Such application shall have attached to it a certificate showing service thereof upon each party to the proceeding in accordance with the provisions of §4.4(b) of this chapter. A similar certificate shall be attached to the answer filed by any party, other than counsel in support of the complaint, showing service of such answer upon the applicant. The Administrative Law Judge or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.

(b) In an adjudicative proceeding where the complaint states that divestiture relief is contemplated, the labor organization[s] representing employees of the respondent[s] may intervene as a matter of right. Applications for such intervention are to be made in accordance with the procedures set forth in paragraph (a) of this section and must be filed within 60 days of the issuance of the complaint. Intervention as a matter of right shall be limited to the issue of the effect, if any, of proposed remedies on employment, with full rights of participation in the proceeding concerning this issue. This paragraph does not affect a labor organization's ability to petition for leave to intervene pursuant to §3.14(a).

[32 FR 8449, June 13, 1967, as amended at 46 FR 20979, Apr. 8, 1981]

§ 3.15 Amendments and supplemental pleadings.

(a) *Amendments*—(1) *By leave.* If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the

parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however*, That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

(2) *Conformance to evidence.* When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

(b) *Supplemental pleadings.* The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit service of a supplemental pleading or notice setting forth transactions, occurrences, or events which have happened since the date of the pleading or notice sought to be supplemented and which are relevant to any of the issues involved.

Subpart C—Prehearing Procedures; Motions; Interlocutory Appeals; Summary Decisions

§ 3.21 Prehearing procedures.

(a) *Meeting of the parties before scheduling conference.* An early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, and to agree, if possible, on a proposed discovery schedule, a preliminary estimate of the time required for the hearing, and a proposed hearing date, and on any other matters to be determined at the scheduling conference.

(b) *Scheduling conference.* Not later than fourteen (14) days after the answer is filed by the last answering respondent, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address their factual and legal theories, a schedule of proceedings, possible limitations on discovery, and other possible agreements or steps that may aid in the orderly and expeditious disposition of the proceeding.

(c) *Prehearing scheduling order.* (1) Not later than two (2) days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings, including a plan of discovery, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference and of the evidentiary hearing.

(2) The Administrative Law Judge may grant a motion to extend any deadline or time specified in this scheduling order only upon a showing of good cause. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

(d) *Meeting prior to final prehearing conference.* Counsel for the parties shall meet before the final prehearing conference described in paragraph (e) of this section to discuss the matters set forth therein in preparation for the conference.

(e) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence,

exchange exhibit and witness lists, and designate testimony to be presented by deposition. At this conference, the Administrative Law Judge shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(f) *Additional prehearing conferences and orders.* The Administrative Law Judge shall hold additional prehearing and status conferences or enter additional orders as may be needed to ensure the orderly and expeditious disposition of a proceeding. Such conferences shall be held in person to the extent practicable.

(g) *Public access and reporting.* Prehearing conferences shall be public unless the Administrative Law Judge determines in his or her discretion that the conference (or any part thereof) shall be closed to the public. The Administrative Law Judge shall have discretion to determine whether a prehearing conference shall be stenographically reported.

[50 FR 41487, Oct. 11, 1985, as amended at 61 FR 50646, Sept. 26, 1996; 66 FR 17628, Apr. 3, 2001]

§ 3.22 Motions.

(a) *Presentation and disposition.* During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under § 3.26, § 3.42(g), or § 4.17, shall be addressed to and ruled upon, if within his or her authority, by the Administrative Law Judge. The Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate. Such recommendation may contain a proposed disposition of the motion or other relevant comments. The Commission may order the ALJ to submit a recommendation or an amplification thereof. Rulings or recommendations containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f). All written motions shall be filed with the Secretary of the Commission, and all motions addressed to the Commission shall be in writing. The moving party shall also provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor. They must also include the name, address, telephone number, fax number, and e-mail address (if any) of counsel and attach a draft order containing the proposed relief. If a party includes in a motion information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the party shall file two versions of the motion in accordance with the procedures set forth in § 3.45(e). The party shall mark its confidential filings with brackets or similar conspicuous markings to indicate the material for which it is claiming confidential treatment. The time period specified by § 3.22(c) within which an opposing party may file an answer will begin to run upon service on that opposing party of the confidential version of the motion.

(c) *Answers.* Within ten (10) days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. If an opposing party includes in an answer information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the opposing party shall file two versions of the answer in accordance with the procedures set forth in § 3.45(e). The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.

(d) *Motions for extensions.* The Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time; however, the Administrative Law Judge shall have no authority to rule on *ex parte* motions for extensions of time.

(e) *Rulings on motions for dismissal.* When a motion to dismiss a complaint or for other relief is granted with the

result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provisions of §3.51. If such a motion is granted as to all charges of the complaint in regard to some, but not all, of the respondents, or is granted as to any part of the charges in regard to any or all of the respondents, the Administrative Law Judge shall enter his ruling on the record, in accordance with the procedures set forth in paragraph (a) of this section, and take it into account in his initial decision. When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge may defer ruling thereon until immediately after all evidence has been received and the hearing record is closed.

(f) *Statement.* Each motion to quash filed pursuant to §3.34(c), each motion to compel or determine sufficiency pursuant to §3.38(a), each motion for sanctions pursuant to §3.38(b), and each motion for enforcement pursuant to §3.38(c) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

[32 FR 8449, June 13, 1967, as amended at 50 FR 42672, Oct. 22, 1985; 52 FR 22293, June 11, 1987; 60 FR 39641, Aug. 3, 1995; 61 FR 50647, Sept. 26, 1996; 66 FR 17628, Apr. 3, 2001]

§3.23 Interlocutory appeals.

(a) *Appeals without a determination by the Administrative Law Judge.* The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge:

(1) Requires the disclosure of records of the Commission or another governmental agency or the appearance of an official or employee of the Commission or another governmental agency pursuant to §3.36, if such appeal is based solely on a claim of privilege: *Provided*, that The Administrative Law Judge shall stay until further order of the Commission the effectiveness of any ruling, whether or not appeal is sought, that requires the disclosure of nonpublic Commission minutes, Commissioner circulations, or similar documents prepared by the Commission, individual Commissioner, or the Office of the General Counsel;

(2) Suspends an attorney from participation in a particular proceeding pursuant to §3.42(d); or

(3) Grants or denies an application for intervention pursuant to the provisions of §3.14.

Appeal from such rulings may be sought by filing with the Commission an application for review, not to exceed fifteen (15) pages exclusive of those attachments required below, within five (5) days after notice of the Administrative Law Judge's ruling. Answer thereto may be filed within five (5) days after service of the application for review. The application for review should specify the person or party taking the appeal; should attach the ruling or part thereof from which appeal is being taken and any other portions of the record on which the moving party relies; and should specify under which provisions hereof review is being sought. The Commission upon its own motion may enter an order staying the return date of an order issued by the Administrative Law Judge pursuant to §3.36 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals upon a determination by the Administrative Law Judge.* Except as provided in paragraph (a) of this section, applications for review of a ruling by the Administrative Law Judge may be allowed only upon request made to the Administrative Law Judge and a determination by the Administrative Law Judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. Applications for review in writing may be filed, not to exceed fifteen (15) pages exclusive of those attachments required below, within five (5) days after notice of the Administrative Law Judge's determination. Additionally, the moving party is required to attach the ruling or part thereof from which appeal is being taken and any other portions of the record on which the moving party is relying. Answer thereto may be filed within five (5) days after service of the application for review. The Commission may thereupon, in its discretion, permit an appeal. Commission review, if permitted, will be confined to the application for review and answer thereto, without oral argument or further briefs, unless otherwise ordered by the Commission.

(c) *Proceedings not stayed.* Application for review and appeal hereunder shall not stay proceedings before the Administrative Law Judge unless the Judge or the Commission shall so order.

[37 FR 5608, Mar. 17, 1972, as amended at 42 FR 31591, June 22, 1977; 42 FR 33025, June 29, 1977; 43 FR 56902 Dec. 5, 1978; 50 FR 53305, Dec. 31, 1985]

§ 3.24 Summary decisions.

(a) *Procedure.* (1) Any party to an adjudicatory proceeding may move, with or without supporting affidavits, for a summary decision in the party's favor upon all or any part of the issues being adjudicated. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is not genuine issue. Counsel in support of the complaint may so move at any time after twenty (20) days following issuance of the complaint and any party respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, shall be filed in accordance with the scheduling order issued pursuant to § 3.21, but in any case at least twenty (20) days before the date fixed for the adjudicatory hearing.

(2) Any other party may, within ten (10) days after service of the motion, file opposing affidavits. The opposing party shall include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, as provided in § 3.24(a)(3). The Administrative Law Judge may, in his discretion, set the matter for oral argument and call for the submission of briefs or memoranda. If a party includes in any such brief or memorandum information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the party shall file two versions of the document in accordance with the procedures set forth in § 3.45(e). The decision sought by the moving party shall be rendered within thirty (30) days after the opposition or any final brief ordered by the Administrative Law Judge is filed, if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law. Any such decision shall constitute the initial decision of the Administrative Law Judge and shall accord with the procedures set forth in § 3.51(c). A summary decision, interlocutory in character and in compliance with the procedures set forth in § 3.51(c), may be rendered on the issue of liability alone although there is a genuine issue as to the nature and extent of relief.

(3) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The Administrative Law Judge may permit affidavits to be supplemented or opposed

by depositions, answers to interrogatories, or further affidavits. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.

(4) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the Administrative Law Judge may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Administrative Law Judge shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

(b) *Affidavits filed in bad faith.* (1) Should it appear to the satisfaction of the Administrative Law Judge at any time that any of the affidavits presented pursuant to this rule are presented in bad faith, or solely for the purpose of delay, or are patently frivolous, the Administrative Law Judge shall enter a determination to that effect upon the record.

(2) If upon consideration of all relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, the Administrative Law Judge concludes that action by him to suspend or remove an attorney from the case is warranted, he shall take action as specified in §3.42(d). If the Administrative Law Judge concludes, upon consideration of all the relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, that the matter should be certified to the Commission for consideration of disciplinary action against an attorney, including reprimand, suspension or disbarment, the examiner shall certify the matter, with his findings and recommendations, to the Commission for its consideration of disciplinary action in the manner provided by the Commission's rules.

[35 FR 5007, Mar. 24, 1970, as amended at 50 FR 53305, Dec. 31, 1985; 52 FR 22293, June 11, 1987; 61 FR 50647, Sept. 26, 1996; 66 FR 17628, Apr. 3, 2001]

§ 3.25 Consent agreement settlements.

(a) The Administrative Law Judge may, in his discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for the settlement of the case, in whole or in part, by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent agreement shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering the proposed consent agreement. Such motion shall be filed with the Secretary of the Commission, as provided in §4.2. Any such motion shall be accompanied by a proposed consent agreement containing a proposed order executed by one or more respondents and conforming to the requirements of §2.32; the proposed consent agreement itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein. If the proposed consent agreement affects only some of the respondents or resolves only some of the charges in adjudication, the motion required by this subsection shall so state and shall specify the portions of the matter that the proposal would resolve.

(c) If the proposed consent agreement accompanying the motion has also been executed by complaint counsel and approved by the appropriate Bureau Director, and the matter is still pending before an Administrative Law Judge, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative

Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section. If the matter is pending before the Commission, the Commission in its discretion may, on motion, issue an order withdrawing from adjudication those portions of the matter that a proposed consent agreement would resolve for the purpose of considering the proposed consent agreement.

(d) If the proposed consent agreement accompanying the motion has not been executed by complaint counsel, the Administrative Law Judge may certify the motion and agreement to the Commission together with his recommendation if he determines, in writing, that there is a likelihood of settlement. The filing of a motion under this subsection and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order. Upon certification of a motion pursuant to this subsection, the Commission may, if it is satisfied that there is a likelihood of settlement, issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve, for the purpose of considering the proposed consent agreement.

(e) The Commission will treat those portions of a matter withdrawn from adjudication pursuant to paragraph (c) or (d) of this section as being in a nonadjudicative status. Portions not so withdrawn shall remain in an adjudicative status.

(f) After some or all of allegations in a matter have been withdrawn from adjudication, the Commission may accept the proposed consent agreement, reject it and return the matter or affected portions thereof to adjudication for further proceedings or take such other action as it may deem appropriate. If the agreement is accepted, it will be disposed of as provided in §2.34 of this chapter, except that if, following the public comment period provided for in §2.34, the Commission decides, based on comments received or otherwise, to withdraw its acceptance of such an agreement, it will so notify the parties and will return to adjudication any portions of the matter previously withdrawn from adjudication for further proceedings or take such other action it considers appropriate.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law Judge on a stipulation of facts and an agreed order.

[40 FR 15236, Apr. 4, 1975, as amended at 42 FR 39659, Aug. 5, 1977; 50 FR 53305, Dec. 31, 1985; 54 FR 18885, May 3, 1989; 61 FR 50647, Sept. 26, 1996; 64 FR 46269, Aug. 25, 1999; 70 FR 67350, Nov. 7, 2005]

§ 3.26 Motions following denial of preliminary injunctive relief.

(a) This section sets forth two procedures by which respondents may obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief in a separate proceeding brought, under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), in aid of the adjudication.

(b) A motion under this section shall be addressed to the Commission and filed with the Secretary of the Commission. Such a motion must be filed within fourteen (14) days after:

(1) A district court has denied preliminary injunctive relief, all opportunity has passed for the Commission to seek reconsideration of the denial or to appeal it, and the Commission has neither sought reconsideration of the denial nor appealed it; or

(2) A court of appeals has denied preliminary injunctive relief.

(c) *Withdrawal from adjudication.* If a court has denied preliminary injunctive relief to the Commission in a section 13(b) proceeding brought in aid of an adjudicative proceeding, respondents may move that the adjudicative proceeding be withdrawn from adjudication in order to consider whether or not the public interest warrants further litigation. Such a motion shall be filed by all of the respondents in the adjudicative proceeding. The Secretary shall issue an order withdrawing the matter from adjudication two days after such a motion is filed, except

that, if complaint counsel have objected that the conditions of paragraph (b) of this section have not been met, the Commission shall determine whether to withdraw the matter from adjudication.

(d) *Consideration on the record.* (1) In lieu of a motion to withdraw a matter from adjudication under paragraph (c) of this section, any respondent or respondents may file a motion under this paragraph to dismiss the administrative complaint on the basis that the public interest does not warrant further litigation after a court has denied preliminary injunctive relief to the Commission. Motions filed under this paragraph shall incorporate or be accompanied by a supporting brief or memorandum.

(2) *Stay.* A motion under this paragraph will stay all proceedings before the Administrative Law Judge until such time as the Commission directs otherwise.

(3) *Answer.* Within fourteen (14) days after service of a motion filed under this paragraph, complaint counsel may file an answer.

(4) *Form.* Motions (including any supporting briefs and memoranda) and answers under this paragraph shall not exceed 30 pages if printed, or 45 pages if typewritten, and shall comply with the requirements of § 3.52(e).

(5) *In camera materials.* If any filing includes materials that are subject to confidentiality protections pursuant to an order entered in either the proceeding under section 13(b) or in the proceeding under this part, such materials shall be treated as *In camera* materials for purposes of this paragraph and the party shall file two versions of the document in accordance with the procedures set forth in § 3.45(e). The time within which complaint counsel may file an answer under this paragraph will begin to run upon service of the *in camera* version of the motion (including any supporting briefs and memoranda).

[60 FR 39641, Aug. 3, 1995]

Subpart D—Discovery; Compulsory Process

§ 3.31 General provisions.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited. The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(b) *Initial disclosures.* Complaint counsel and respondent's counsel shall, within five (5) days of receipt of a respondent's answer to the complaint and without awaiting a discovery request, provide to each other:

(1) The name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1);

(2) A copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the Commission or respondent(s) that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); unless such information or materials are privileged as defined in § 3.31(c)(2), pertain to hearing preparation as defined in § 3.31(c)(3), pertain to experts as defined in § 3.31(c)(4), or are obtainable from some other source that is more convenient, less burdensome, or less expensive. A party shall make its disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation.

(3) In addition to the disclosures required by paragraphs (b)(1) and (2), of this section, the parties shall disclose

to each other the identity of any person who may be used at trial to present evidence as an expert. Except as otherwise stipulated or directed by the Administrative Law Judge, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. These disclosures shall be made at the times and in the sequence directed by the Administrative Law Judge. In the absence of other directions from the Administrative Law Judge or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut proposed expert testimony on the same subject matter identified by another party under this paragraph, within 30 days after the disclosure made by the other party.

(c) *Scope of discovery*. Unless otherwise limited by order of the Administrative Law Judge or the Commission in accordance with these rules, the scope of discovery is as follows:

(1) *In general; limitations*. Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having any knowledge of any discoverable matter. Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he determines that:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery outweigh its likely benefit.

(2) *Privilege*. The Administrative Law Judge may enter a protective order denying or limiting discovery to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(3) *Hearing preparations: Materials*. Subject to the provisions of paragraph (c)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(4) *Hearing Preparation: Experts.* (i) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under §3.31(b)(3), the deposition shall not be conducted until after the report is provided.

(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

(ii) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(d) *Protective orders; order to preserve evidence.* (1) The Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. Such an order may also be issued to preserve evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing.

(2) [Reserved]

(e) *Supplementation of disclosures and responses.* A party who has made an initial disclosure under §3.31(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its initial disclosures under §3.31(b) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect.

(f) *Stipulations.* When approved by the Administrative Law Judge, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

(g) *Ex parte rulings on applications for compulsory process.* Applications for the issuance of subpoenas to compel testimony at an adjudicative hearing pursuant to §3.34 may be made *ex parte*, and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the Administrative Law Judge or the Commission.

[43 FR 56864, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985; 61 FR 50647, Sept. 26, 1996; 66 FR 17628, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

§ 3.32 Admissions.

(a) At any time after thirty (30) days after issuance of complaint, or after publication of notice of an adjudicative hearing in a rulemaking proceeding under §3.13, any party may serve on any other party a written request for admission of the truth of any matters relevant to the pending proceeding set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or are known to be, and in

the request are stated as being, in the possession of the other party. Each matter of which an admission is requested shall be separately set forth. A copy of the request shall be filed with the Secretary.

(b) The matter is admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission, with a copy filed with the Secretary, a sworn written answer or objection addressed to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify its answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that it has made reasonable inquiry and that the information known to or readily obtainable by the party is insufficient to enable it to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set fourth reasons why the party cannot admit or deny it.

(c) Any matter admitted under this rule is conclusively established unless the Administrative Law Judge on motion permits withdrawal or amendment of the admission. The Administrative Law Judge may permit withdrawal or amendment when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[43 FR 56865, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985]

§ 3.33 Depositions.

(a) *In general.* Any party may take a deposition of a named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under §3.31(c)(1). Such party may, by motion, obtain from the Administrative Law Judge an order to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. Depositions may be taken before any person having power to administer oaths, either under the law of the United States or of the state or other place in which the deposition is taken, who may be designated by the party seeking the deposition, provided that such person shall have no interest in the outcome of the proceeding. The party seeking the deposition shall serve upon each person whose deposition is sought and upon each party to the proceeding reasonable notice in writing of the time and place at which it will be taken, and the name and address of each person or persons to be examined, if known, and if the name is not known, a description sufficient to identify them. The parties may stipulate in writing or the Administrative Law Judge may upon motion order that a deposition be taken by telephone or other remote electronic means. A deposition taken by such means is deemed taken at the place where the deponent is to answer questions.

(b) [Reserved]

(c) *Notice to corporation or other organization.* A party may name as the deponent a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office to the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. The organization

so names shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any party shall have the right to question him. Objections to questions or to evidence presented shall be in short form, stating the grounds of objections relied upon. The questions propounded and the answers thereto, together with all objections made, shall be recorded and certified by the officer. Thereafter, upon payment of the charges therefor, the officer shall furnish a copy of the deposition to the deponent and to any party.

(e) *Depositions upon written questions.* A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(1) The name and address of the person who is to answer them, and

(2) The name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission in accordance with the provisions of Rule 3.33(c). Within 30 days after the notice and written questions are served, any other party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, the party taking the deposition may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, any other party may serve recross questions upon all other parties. The content of any question shall not be disclosed to the deponent prior to the taking of the deposition. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(f) *Correction of deposition.* A deposition may be corrected, as to form or substance, in the manner provided by § 3.44(b). Any such deposition shall, in addition to the other required procedures, be read to or by the deponent and signed by him, unless the parties by stipulation waive the signing or the deponent is unavailable or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission or attempted submission, the officer shall sign it and certify that the signing has been waived or that the deponent is unavailable or that the deponent has refused to sign, as the case may be, together with the reason for the refusal to sign, if any has been given. The deposition may then be used as though signed unless, on a motion to suppress under Rule 3.33(g)(3)(iv), the Administrative Law Judge determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. In addition to and not in lieu of the procedure for formal correction of the deposition, the deponent may enter in the record at the time of signing a list of objections to the transcription of his remarks, stating with specificity the alleged errors in the transcript.

(g)(1) *Use of depositions in hearings.* At the hearing on the complaint or upon a motion, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(i) Any deposition may be used for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(ii) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership or association which is a party, or of an official or employee (other than a special employee) of the Commission, may be used by an adverse party for any purpose.

(iii) A deposition may be used by any party for any purpose if the Administrative Law Judge finds:

(A) That the deponent is dead; or

(B) That the deponent is out of the United States or is located at such a distance that his attendance would be impractical, unless it appears that the absence of the deponent was procured by the party offering the deposition; or

(C) That the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(D) That the party offering the deposition has been unable to procure the attendance of the deponent by subpoena; or

(E) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(iv) If only part of a deposition is offered in evidence by a party, any other party may introduce any other part which ought in fairness to be considered with the part introduced.

(2) *Objections to admissibility.* Subject to the provisions of paragraph (g)(3) of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(3) *Effect of errors and irregularities in depositions*—(i) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(ii) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(iii) *As to taking of deposition.* (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions are waived unless served in writing upon all parties within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(iv) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or with due diligence might have been ascertained.

[43 FR 56865, Dec. 4, 1978, as amended at 61 FR 50648, Sept. 26, 1996; 66 FR 17629, Apr. 3, 2001]

§ 3.34 Subpoenas.

(a) *Subpoenas ad testificandum*—(1) *Prehearing.* The Secretary of the Commission shall issue a subpoena, signed but otherwise in blank, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena, who shall complete it before service.

(2) *Hearing.* Application for issuance of a subpoena commanding a person to attend and give testimony at an adjudicative hearing shall be made in writing to the Administrative Law Judge. Such subpoena may be issued upon a showing of the reasonable relevancy of the expected testimony.

(b) *Subpoenas duces tecum; subpoenas to permit inspection of premises.* The Secretary of the Commission, upon request of a party, shall issue a subpoena, signed but otherwise in blank, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be produced. The person commanded by the subpoena need not appear in person at the place of production or inspection unless commanded to appear for a deposition or hearing pursuant to paragraph (a) of this section. As used herein, the term ''documents'' includes writings, drawings, graphs, charts, handwritten notes, film, photographs, audio and video recordings and any such representations stored on a computer, a computer disk, CD-ROM, magnetic or electronic tape, or any other means of electronic storage, and other data compilations from which information can be obtained in machine-readable form (translated, if necessary, into reasonably usable form by the person subject to the subpoena). A subpoena *duces tecum* may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes, and shall specify with reasonable particularity the materials to be produced.

(c) *Motions to quash; limitation on subpoenas subject to § 3.36.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by Rule 3.22(f). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas requiring the appearance of, or the production of documents in the possession, custody, or control of, an official or employee of a governmental agency other than the Commission, or subpoenas to be served in a foreign country, which may be authorized only in accordance with § 3.36.

[43 FR 56866, Dec. 4, 1978, as amended at 50 FR 42672, Oct. 22, 1985; 61 FR 50648, Sept. 26, 1996; 66 FR 17629, Apr. 3, 2001]

§ 3.35 Interrogatories to parties.

(a) *Availability; Procedures for Use.* (1) Any party may serve upon any other party written interrogatories, not exceeding twenty-five (25) in number, including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his capacity as custodian or recorder of any such information, or their respective staffs.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within thirty (30) days after the service of the interrogatories. The Administrative Law Judge may allow a shorter or longer time.

(b) *Scope; use at hearing.* (1) Interrogatories may relate to any matters that can be inquired into under § 3.31(c)(1), and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory

involves an opinion or contention that relates to fact or the application of law to fact, but the Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) *Option to produce records.* Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

[43 FR 56867, Dec. 4, 1978, as amended at 61 FR 50649, Sept. 26, 1996]

§ 3.36 Applications for subpoenas for records, or appearances by officials or employees, of governmental agencies other than the Commission, and subpoenas to be served in a foreign country.

(a) *Form.* An application for issuance of a subpoena for the production of documents, as defined in §3.34(b), or for the issuance of a subpoena requiring access to documents or other tangible things, for the purposes described in §3.37(a), in the possession, custody, or control of a governmental agency other than the Commission or the officials or employees of such other agency, or for the issuance of a subpoena requiring the appearance of an official or employee of another governmental agency, or for the issuance of a subpoena to be served in a foreign country, shall be made in the form of a written motion filed in accordance with the provisions of §3.22(a). No application for records pursuant to §4.11 of this chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) *Content.* The motion shall satisfy the same requirements for a subpoena under §3.34 or a request for production or access under §3.37, together with a specific showing that:

(1) The material sought is reasonable in scope:

(2) If for purposes of discovery, the material falls within the limits of discovery under §3.31(c)(1), or, if for an adjudicative hearing, the material is reasonably relevant;

(3) The information or material sought cannot reasonably be obtained by other means; and

(4) With respect to subpoenas to be served in a foreign country, that the party seeking discovery has a good faith belief that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

(c) *Execution.* If an ALJ issues an Order authorizing a subpoena pursuant to this section, the moving party may forward to the Secretary a request for the authorized subpoena, with a copy of the authorizing Order attached. Each such subpoena shall be signed by the Secretary; shall have attached to it a copy of the authorizing Order; and shall be served by the moving party only in conjunction with a copy of the authorizing Order.

[66 FR 17629, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

§ 3.37 Production of documents and things; access for inspection and other purposes.

(a) *Availability; procedures for use.* Any party may serve on another party a request: to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents, as defined in §3.34(b), or to inspect and copy, test, or sample any tangible things which are within the scope of §3.31(c)(1) and in the possession, custody or control of the party upon whom the request is served; or to permit

entry upon designated land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 3.31(c)(1). Each such request shall specify with reasonable particularity the documents or things to be inspected, or the property to be entered. Each such request shall also specify a reasonable time, place, and manner of making the inspection and performing the related acts. A party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in § 3.34.

(b) *Response; objections.* The response of the party upon whom the request is served shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under § 3.38(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

[61 FR 50649, Sept. 26, 1996]

§ 3.38 Motion for order compelling disclosure or discovery; sanctions.

(a) *Motion for order to compel.* A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, or an interrogatory under § 3.35.

(1) *Initial disclosures; requests for admission; depositions; interrogatories.* Unless the objecting party sustains its burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served or disclosure otherwise be made. If the Administrative Law Judge determines that an answer or other response by the objecting party does not comply with the requirements of these rules, he may order either that the matter is admitted or that an amended answer or response be served. The Administrative Law Judge may, in lieu of these orders, determine that final disposition may be made at a prehearing conference or at a designated time prior to trial.

(2) *Requests for production or access.* If a party fails to respond to or comply as requested with a request for production or access made under § 3.37(a), the discovering party may move for an order to compel production or access in accordance with the request.

(b) If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the

withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

(c) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge or an order or opinion of the Commission. It shall be the duty of parties to seek and Administrative Law Judges to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence. If in the Administrative Law Judge's opinion such relief would not be sufficient, or in instances where a nonparty fails to comply with a subpoena or order, he shall certify to the Commission a request that court enforcement of the subpoena or order be sought.

[43 FR 56867, Dec. 4, 1978, as amended at 50 FR 53305, Dec. 31, 1985; 61 FR 50649, Sept. 26, 1996]

§ 3.38A Withholding requested material.

(a) Any person withholding material responsive to a subpoena issued pursuant to § 3.34, written interrogatories requested pursuant to § 3.35, a request for production or access pursuant to § 3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

(b) A person withholding material for reasons described in § 3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

(Sec. 5, 38 Stat. 719 as amended (15 U.S.C. 45))

[44 FR 54043, Sept. 18, 1979, as amended at 61 FR 50650, Sept. 26, 1996]

§ 3.39 Orders requiring witnesses to testify or provide other information and granting immunity.

(a) Where Commission complaint counsel desire the issuance of an order requiring a witness or deponent to testify or provide other information and granting immunity under title 18, section 6002, United States Code, Directors and Assistant Directors of Bureaus and Regional Directors and Assistant Regional Directors of Commission Regional Offices who supervise complaint counsel responsible for presenting evidence in support of the complaint are authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his privilege against self-incrimination; and to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of such order. Upon receipt of approval by the Attorney General (or his designee), the Administrative Law Judge is authorized to issue an order requiring the witness or deponent to testify or provide other information and granting immunity when the witness or deponent has invoked his privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(b) Requests by counsel other than Commission complaint counsel for an order requiring a witness to testify or provide other information and granting immunity under title 18, section 6002, United States Code, may be made to the Administrative Law Judge and may be made *ex parte*. When such requests are made, the Administrative Law Judge is authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his privilege against self-incrimination; and, upon making such determinations, to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity; and, after the Attorney General (or his designee) has granted such approval, to issue such order when the witness or deponent has invoked his privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(18 U.S.C. 6002, 6004)

[37 FR 5017, Mar. 9, 1972, as amended at 50 FR 53306, Dec. 31, 1985; 66 FR 64143, Dec. 12, 2001]

§ 3.40 Admissibility of evidence in advertising substantiation cases.

(a) If a person, partnership, or corporation is required through compulsory process under section 6, 9 or 20 of the Act issued after October 26, 1977 to submit to the Commission substantiation in support of an express or an implied representation contained in an advertisement, such person, partnership or corporation shall not thereafter be allowed, in any adjudicative proceeding in which it is alleged that the person, partnership, or corporation lacked a reasonable basis for the representation, and for any purpose relating to the defense of such allegation, to introduce into the record, whether directly or indirectly through references contained in documents or oral testimony, any material of any type whatsoever that was required to be but was not timely submitted in response to said compulsory process. *Provided, however*, that a person, partnership, or corporation is not, within the meaning of this section, required through compulsory process to submit substantiation with respect to those portions of said compulsory process to which such person, partnership, or corporation has raised good faith legal objections in a timely motion pursuant to the Commission's Rules of Practice and Procedure, until the Commission denies such motion; or if the person, partnership, or corporation thereafter continues to refuse to comply, until such process has been judicially enforced.

(b) The Administrative Law Judge shall, upon motion, at any stage exclude all material that was required to be but was not timely submitted in response to compulsory process described in paragraph (a) of this section, or any reference to such material, unless the person, partnership, or corporation demonstrates in a hearing, and the Administrative Law Judge finds, that by the exercise of due diligence the material could not have been timely submitted in response to the compulsory process, and that the Commission was notified of the existence of the material immediately upon its discovery. Said findings of the Administrative Law Judge shall be in writing and shall specify with particularity the evidence relied upon. The rules normally governing the admissibility of evidence in Commission proceedings shall in any event apply to any material coming within the above exception.

[42 FR 56500, Oct. 10, 1977; 42 FR 61450, Dec. 5, 1977, as amended at 45 FR 45578, July 7, 1980]

Subpart E—Hearings

§ 3.41 General rules.

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public unless an *in camera* order is entered by the Administrative Law Judge pursuant to § 3.45(b) of this chapter or unless otherwise ordered by the Commission.

(b) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded. Consistent with the requirements of expedition:

(1) The Administrative Law Judge may order hearings at more than one place and may grant a reasonable recess at the end of a case-in-chief for the purpose of discovery deferred during the pre-hearing procedure where the Administrative Law Judge determines

that such recess will materially expedite the ultimate disposition of the proceeding.

(2) When actions involving a common question of law or fact are pending before the Administrative Law Judge, the Administrative Law Judge may order a joint hearing of any or all the matters in issue in the actions; the Administrative Law Judge may order all the actions consolidated; and the Administrative Law Judge may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(3) When separate hearings will be conducive to expedition and economy, the Administrative Law Judge may order a separate hearing of any claim, or of any separate issue, or of any number of claims or issues.

(c) *Rights of parties.* Every party, except intervenors, whose rights are determined under §3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(d) *Adverse witnesses.* An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him.

(e) *Participation in adjudicative packaging and labeling hearings.* At adjudicative hearings under the Fair Packaging and Labeling Act, any party or any interested person designated as a party pursuant to §3.13, or his representative, may be sworn as a witness and heard.

(f) Requests for an order requiring a witness to testify or provide other information and granting immunity under title 18, section 6002, of the United States Code, shall be disposed of in accordance with §3.39.

(18 U.S.C. 6002, 6004)

[32 FR 8449, June 13, 1967, as amended at 37 FR 5017, Mar. 9, 1972; 37 FR 5609, Mar. 17, 1972; 39 FR 34398, Sept. 25, 1974; 44 FR 62887, Nov. 1, 1979]

§3.42 Presiding officials.

(a) *Who presides.* Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges; and the term *Administrative Law Judge* as used in this part means and applies to the Commission or any of its members when so sitting.

(b) *How assigned.* The presiding Administrative Law Judge shall be designated by the Chief Administrative Law Judge or, when the Commission or one or more of its members preside, by the Commission, who shall notify the parties of the Administrative Law Judge designated.

(c) *Powers and duties.* Administrative Law Judges shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to that end, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpenas and orders requiring answers to questions;

(3) To take depositions or to cause depositions to be taken;

(4) To compel admissions, upon request of a party or on their own initiative;

(5) To rule upon offers of proof and receive evidence;

(6) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose;

(8) To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding, including motions to open defaults;

(9) To make and file initial decisions;

(10) To certify questions to the Commission for its determination;

(11) To reject written submissions that fail to comply with rule requirements, or deny *in camera* status without prejudice until a party complies with all relevant rules; and

(12) To take any action authorized by the rules in this part or in conformance with the provisions of the Administrative Procedure Act as restated and incorporated in title 5, U.S.C.

(d) *Suspension of attorneys by Administrative Law Judge.* The Administrative

Law Judge shall have the authority, for good cause stated on the record, to suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of such proceeding. Any attorney so suspended or barred may appeal to the Commission in accordance with the provisions of § 3.23(a). The appeal shall not operate to suspend the hearing unless otherwise ordered by the Administrative Law Judge or the Commission; in the event the hearing is not suspended, the attorney may continue to participate therein pending disposition of the appeal.

(e) *Substitution of Administrative Law Judge.* In the event of the substitution of a new Administrative Law Judge for the one originally designated, any motion predicated upon such substitution shall be made within five (5) days thereafter.

(f) *Interference.* In the performance of their adjudicative functions, Administrative Law Judges shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission, and all direction by the Commission to Administrative Law Judges concerning any adjudicative proceedings shall appear in and be made a part of the record.

(g) *Disqualification of Administrative Law Judges.* (1) When an Administrative Law Judge deems himself disqualified to preside in a particular proceeding, he shall withdraw therefrom by notice on the record and shall notify the Director of Administrative Law Judges of such withdrawal.

(2) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary a motion addressed to the Administrative Law Judge to disqualify and remove him, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. If the Administrative Law Judge does not disqualify himself within ten (10) days, he shall certify the motion to the Commission, together with any statement he may wish to have considered by the Commission. The Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another Administrative Law Judge appointed to conduct a hearing for that purpose.

(3) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(h) *Failure to comply with Administrative Law Judge's directions.* Any party who refuses or fails to comply with a lawfully issued order or direction of an Administrative Law Judge may be considered to be in contempt of the Commission. The circumstances of any such neglect, refusal, or failure, together with a recommendation for appropriate action, shall be promptly certified by the Administrative Law Judge to the Commission. The Commission may make such orders in regard thereto as the circumstances may warrant.

[32 FR 8449, June 13, 1967, as amended at 37 FR 5609, Mar. 17, 1972; 41 FR 8340, Feb. 26, 1976; 43 FR 56868, Dec. 4, 1978; 46 FR 45750, Sept. 15, 1981; 50 FR 53306, Dec. 31, 1985; 66 FR 17629, Apr. 3, 2001]

§ 3.43 Evidence.

(a) *Burden of proof.* Counsel representing the Commission, or any person who has filed objections sufficient to warrant the holding of an adjudicative hearing pursuant to § 3.13, shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility; exclusion of relevant evidence; mode and order of interrogation and presentation.* (1) Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation

of cumulative evidence. The Administrative Law Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to—

(i) Make the interrogation and presentation effective for the ascertainment of the truth.

(ii) Avoid needless consumption of time; and

(iii) Protect witnesses from harassment or undue embarrassment.

(2) As respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files, the burden of proof is on the respondent to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business. *See Lenox, Inc.*, 73 F.T.C. 578, 603–04 (1968).

(c) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding.

(d) *Official notice.* When any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) *Objections.* Objections to evidence shall timely and briefly state the grounds relied upon, but the transcript shall not include argument or debate thereon except as ordered by the Administrative Law Judge. Rulings on all objections shall appear in the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

[32 FR 8449, June 13, 1967; 32 FR 8711, June 17, 1967, as amended at 48 FR 44766, Sept. 30, 1983; 61 FR 50650, Sept. 26, 1996; 66 FR 17629, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

§ 3.44 Record.

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed by the official reporter of the Commission under the supervision of the Administrative Law Judge, and the original transcript shall be a part of the record and the sole official transcript. Copies of transcripts are available from the reporter at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the Administrative Law Judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the Administrative Law Judge, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the Administrative Law Judge. Corrections shall not be ordered by the Administrative Law Judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Commission.

(c) *Closing of the hearing record.* Immediately upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record. The Administrative Law Judge shall retain the discretion to permit or order correction of the record as provided in § 3.44(b).

[32 FR 8449, June 13, 1967, as amended at 61 FR 50650, Sept. 26, 1996; 66 FR 17630, Apr. 3, 2001]

§ 3.45 *In camera* orders.

(a) *Definition.* Except as hereinafter provided, material made subject to an *in camera* order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding.

(b) *In camera treatment of material.* A party or third party may obtain *in camera* treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge. Parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten (10) days notice of the proposed use of such material. Each such motion must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear. The Administrative Law Judge may order that such material, whether admitted or rejected, be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment. This finding shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *see also Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), which established a three-part test that was modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The party submitting material for which *in camera* treatment is sought must provide, for each piece of such evidence and affixed to such evidence, the name and address of any person who should be notified in the event that the Commission intends to disclose *in camera* information in a final decision. No material, or portion thereof, offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which *in camera* treatment will expire, and including:

(1) A description of the material;

(2) A statement of the reasons for granting *in camera* treatment; and

(3) A statement of the reasons for the date on which *in camera* treatment will expire. Such expiration date may not be omitted except in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is entitled to *in camera* treatment for an indeterminate period. If an *in camera* order is silent as to duration, without explanation, then it will expire three years after its date of issuance. Material subject to an *in camera* order shall be segregated from the public record and filed in a sealed envelope, or other appropriate container, bearing the title, the docket number of the proceeding, the notation ''*In Camera* Record under § 3.45,'' and the date on which *in camera* treatment expires. If the Administrative Law Judge has determined that *in camera* treatment should be granted for an indeterminate period, the notation should state that fact.

(c) *Release of in camera material. In camera* material constitutes part of the confidential records of the Commission and is subject to the provisions of § 4.11 of this chapter.

(d) *Briefs and other submissions referring to in camera or confidential information.* Parties shall not disclose information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in the public version of proposed findings, briefs, or other documents. This provision does not preclude references in such proposed findings, briefs, or other documents to *in camera* or other confidential information or general statements based on the content of such information.

(e) *When in camera or confidential information is included in briefs and other submissions.* If a party includes specific information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections

pursuant to a protective order in any document filed in a proceeding under this part, the party shall file two versions of the document. A complete version shall be marked ''*In Camera*'' or ''Subject to Protective Order,'' as appropriate, on the first page and shall be filed with the Secretary and served by the party on the other parties in accordance with the rules in this part. Submitters of *in camera* or other confidential material should mark any such material in the complete versions of their submissions in a conspicuous matter, such as with highlighting or bracketing. References to *in camera* or confidential material must be supported by record citations to relevant evidentiary materials and associated ALJ *in camera* or other confidentiality rulings to confirm that *in camera* or other confidential treatment is warranted for such material. In addition, the document must include an attachment containing a copy of each page of the document in question on which *in camera* or otherwise confidential excerpts appear, and providing the name and address of any person who should be notified of the Commission's intent to disclose in a final decision any of the *in camera* or otherwise confidential information in the document. Any time period within which these rules allow a party to respond to a document shall run from the date the party is served with the complete version of the document. An expurgated version of the document, marked ''Public Record'' on the first page and omitting the *in camera* and confidential information and attachment that appear in the complete version, shall be filed with the Secretary within five (5) days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise, and shall be served by the party on the other parties in accordance with the rules in this part. The expurgated version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the *in camera* version.

(f) *When in camera or confidential information is included in rulings or recommendations of the Administrative Law Judge.* If the Administrative Law Judge includes in any ruling or recommendation information that has been granted *in camera* status pursuant to §3.45(b) or is subject to confidentiality protections pursuant to a protective order, the Administrative Law Judge shall file two versions of the ruling or recommendation. A complete version shall be marked ''*In Camera*'' or ''Subject to Protective Order,'' as appropriate, on the first page and shall be served upon the parties. The complete version will be placed in the *in camera* record of the proceeding. An expurgated version, to be filed within five (5) days after the filing of the complete version, shall omit the *in camera* and confidential information that appears in the complete version, shall be marked ''Public Record'' on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding.

(g) *Provisional in camera rulings.* The Administrative Law Judge may make a provisional grant of *in camera* status to materials if the showing required in §3.45(b) cannot be made at the time the material is offered into evidence but the Administrative Law Judge determines that the interests of justice would be served by such a ruling. Within twenty (20) days of such a provisional grant of *in camera* status, the party offering the evidence or an interested third party must present a motion to the Administrative Law Judge for a final ruling on whether *in camera* treatment of the material is appropriate pursuant to §3.45(b). If no such motion is filed, the Administrative Law Judge may either exclude the evidence, deny *in camera* status, or take such other action as is appropriate.

[66 FR 17630, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

§ 3.46 Proposed findings, conclusions, and order.

(a) *General.* Upon the closing of the hearing record, or within a reasonable time thereafter fixed by the Administrative Law Judge, any party may file with the Secretary of the Commission for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and

briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. If a party includes in the proposals information that has been granted *in camera* status pursuant to § 3.45(b), the party shall file two versions of the proposals in accordance with the procedures set forth in § 3.45(e).

(b) *Exhibit Index.* The first statement of proposed findings of fact and conclusions of law filed by a party shall include an index listing for each exhibit offered by the party and received in evidence:

(1) The exhibit number, followed by

(2) The exhibit's title or a brief description if the exhibit is untitled;

(3) The transcript page at which the Administrative Law Judge ruled on the exhibit's admissibility or a citation to any written order in which such ruling was made;

(4) The transcript pages at which the exhibit is discussed;

(5) An identification of any other exhibit which summarizes the contents of the listed exhibit, or of any other exhibit of which the listed exhibit is a summary;

(6) A cross-reference, by exhibit number, to any other portions of that document admitted as a separate exhibit on motion by any other party; and

(7) A statement whether the exhibit has been accorded *in camera* treatment, and a citation to the *in camera* ruling.

(c) *Witness Index.* The first statement of proposed findings of fact and conclusions of law filed by a party shall also include an index to the witnesses called by that party, to include for each witness:

(1) The name of the witness;

(2) A brief identification of the witness;

(3) The transcript pages at which any testimony of the witness appears; and

(4) A statement whether the exhibit has been accorded *in camera* treatment, and a citation to the *in camera* ruling.

(d) *Stipulated indices.* As an alternative to the filing of separate indices, the parties are encouraged to stipulate to joint exhibit and witness indices at the time the first statement of proposed findings of fact and conclusions of law is due to be filed.

(e) *Rulings.* The record shall show the Administrative Law Judge's ruling on each proposed finding and conclusion, except when the order disposing of the proceeding otherwise informs the parties of the action taken.

[48 FR 56945, Dec. 27, 1983, as amended at 52 FR 22294, June 11, 1987; 61 FR 50650, Sept. 26, 1996; 66 FR 17631, Apr. 3, 2001]

Subpart F—Decision

§ 3.51 Initial decision.

(a) *When filed and when effective.* The Administrative Law Judge shall file an initial decision within ninety (90) days after closing the hearing record pursuant to § 3.44(c), or within thirty (30) days after a default or the granting of a motion for summary decision or waiver by the parties of the filing of proposed findings of fact, conclusions of law and order, or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge. In no event shall the initial decision be filed any later than one (1) year after the issuance of the administrative compliant, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days. Such extension, upon its expiration, may be continued for additional consecutive periods of up to sixty (60) days, provided that each additional period is based upon a finding by the Administrative Law Judge that extraordinary circumstances are still present. The pendency of any collateral federal court proceeding that relates to the administrative adjudication shall toll the one-year deadline for filing the initial decision. The ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding. Once issued, the initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of a timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing

the case on its own docket for review or staying the effective date of the decision.

(b) *Exhaustion of administrative remedies.* An initial decision shall not be considered final agency action subject to judicial review under 5 U.S.C. 704. Any objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived.

(c) *Content.* (1) An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence. The initial decision shall include a statement of findings (with specific page references to principal supporting items of evidence in the record) and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record (or those designated under paragraph (c)(2) of this section) and an appropriate rule or order. Rulings containing information granted *in camera* status pursuant to §3.45 shall be filed in accordance with §3.45(f).

(2) When more than one claim for relief is presented in an action, or when multiple parties are involved, the Administrative Law Judge may direct the entry of an initial decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of initial decision.

(d) *By whom made.* The initial decision shall be made and filed by the Administrative Law Judge who presided over the hearings, except when he shall have become unavailable to the Commission.

(e) *Reopening of proceeding by Administrative Law Judge; termination of jurisdiction.* (1) At any time prior to the filing of his initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law Judge is terminated upon the filing of his initial decision with respect to those issues decided pursuant to paragraph (c)(1) of this section.

[32 FR 8449, June 13, 1967, as amended at 35 FR 10656, July 1, 1970; 44 FR 62887, Nov. 1, 1979; 48 FR 52576, Nov. 21, 1983; 48 FR 54810, Dec. 7, 1983; 52 FR 22294, June 11, 1987; 61 FR 50650, Sept. 26, 1996; 66 FR 17631, Apr. 3, 2001]

§3.52 Appeal from initial decision.

(a) *Who may file; notice of intention.* Any party to a proceeding may appeal an initial decision to the Commission by filing a notice of appeal with the Secretary within ten (10) days after service of the initial decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within five (5) days after service of the first notice, or within ten (10) days after service of the initial decision, whichever period expires last.

(b) *Appeal brief.* (1) The appeal shall be in the form of a brief, filed within thirty (30) days after service of the initial decision, and shall contain, in the order indicated, the following:

(i) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(ii) A concise statement of the case, which includes a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(iii) A specification of the questions intended to be urged;

(iv) The argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the record and the legal or other material relied upon; and

(v) A proposed form of order for the Commission's consideration instead of

the order contained in the initial decision.

(2) The brief shall not, without leave of the Commission, exceed 18,750 words, including all footnotes and other substantive matter but excluding the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e).

(c) *Answering brief.* Within thirty (30) days after service of the appeal brief, the appellee may file an answering brief, which shall contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto, as well as arguments in response to the appellant's appeal brief. However, if the appellee is also cross-appealing, its answering brief shall also contain its arguments as to any issues the party is raising on cross-appeal, including the points of fact and law relied upon in support of its position on each question, with specific page references to the record and legal or other material on which the party relies in support of its cross-appeal, and a proposed form of order for the Commission's consideration instead of the order contained in the initial decision. If the appellee does not cross-appeal, its answering brief shall not, without leave of the Commission, exceed 18,750 words. If the appellee cross-appeals, its brief in answer and on cross-appeal shall not, without leave of the Commission, exceed 26,250 words. The word count limitations of this paragraph include all footnotes and other substantive matter but exclude the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e).

(d) *Reply brief.* Within seven (7) days after service of the appellee's answering brief, the appellant may file a reply brief, which shall be limited to rebuttal of matters in the answering brief and shall not, without leave of the Commission, exceed 18,750 words. If the appellee has cross-appealed, any party who is the subject of the cross-appeal may, within thirty (30) days after service of such appellee's brief, file a reply brief, which shall be limited to rebuttal of matters in the appellee's brief and shall not, without leave of the Commission, exceed 18,750 words. The appellee who has cross-appealed may, within seven (7) days after service of a reply to its cross-appeal, file an additional brief, which shall be limited to rebuttal of matters in the reply to its cross-appeal and shall not, without leave of the Commission, exceed 11,250 words. The word count limitations of this paragraph include all footnotes and other substantive matter but exclude the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e). No further briefs may be filed except by leave of the Commission.

(e) *In camera information.* If a party includes in any brief to be filed under this section information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality provisions pursuant to a protective order, the party shall file two versions of the brief in accordance with the procedures set forth in § 3.45(e). The time period specified by this section within which a party may file an answering or reply brief will begin to run upon service on the party of the *in camera* or confidential version of a brief.

(f) *Signature.* (1) The original of each brief filed shall have a hand-signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association.

(2) Signing a brief constitutes a representation by the signer that he or she has read it; that to the best of his or her knowledge, information, and belief, the statements made in it are true; that it is not interposed for delay; that it complies all the applicable word count limitation; and that to the best of his or her knowledge, information, and belief, it complies with all the other rules in this part. If a brief is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the

proceeding may go forward as though the brief has not been filed.

(g) *Designation of appellant and appellee in cases involving cross-appeals.* In a case involving an appeal by complaint counsel and one or more respondents, any respondent who has filed a timely notice of appeal and as to whom the Administrative Law Judge has issued an order to cease and desist shall be deemed an appellant for purposes of paragraphs (b), (c), and (d) of this section. In a case in which the Administrative Law Judge has dismissed the complaint as to all respondents, complaint counsel shall be deemed the appellant for purposes of paragraphs (b), (c), and (d) of this section.

(h) *Oral argument.* All oral arguments shall be public unless otherwise ordered by the Commission. Oral arguments will be held in all cases on appeal to the Commission, unless the Commission otherwise orders upon its own initiative or upon request of any party made at the time of filing his brief. Oral arguments before the Commission shall be reported stenographically, unless otherwise ordered, and a member of the Commission absent from an oral argument may participate in the consideration and decision of the appeal in any case in which the oral argument is stenographically reported. The purpose of oral argument is to emphasize and clarify the written argument appearing in the briefs and to answer questions. Reading at length from the briefs or other texts is not favored.

(i) *Corrections in transcript of oral argument.* The Commission will entertain only joint motions of the parties requesting corrections in the transcript of oral argument, except that the Commission will receive a unilateral motion which recites that the parties have made a good faith effort to stipulate to the desired corrections but have been unable to do so. If the parties agree in part and disagree in part, they should file a joint motion incorporating the extent of their agreement, and, if desired, separate motions requesting those corrections to which they have been unable to agree. The Secretary, pursuant to delegation of authority by the Commission, is authorized to prepare and issue in the name of the Commission a brief ''Order Correcting Transcript'' whenever a joint motion to correct transcript is received.

(j) *Briefs of amicus curiae.* A brief of an amicus curiae may be filed by leave of the Commission granted on motion with notice to the parties or at the request of the Commission, except that such leave shall not be required when the brief is presented by an agency or officer of the United States; or by a State, territory, commonwealth, or the District of Columbia, or by an agency or officer of any of them. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and state how a Commission decision in the matter would affect the applicant or persons it represents. The motion shall also state the reasons why a brief of an amicus curiae is desirable. Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed. A motion for an amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

(k) *Extension of word count limitation.* Extensions of word count limitation are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit.

[66 FR 17631, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

§ 3.53 Review of initial decision in absence of appeal.

An order by the Commission placing a case on its own docket for review will set forth the scope of such review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

§ 3.54 Decision on appeal or review.

(a) Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve

the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision.

(b) In rendering its decision, the Commission will adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions.

(c) In those cases where the Commission believes that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Commission, in its discretion, may withhold final action pending the receipt of such additional information or views.

(d) The order of the Commission disposing of adjudicative hearings under the Fair Packaging and Labeling Act will be published in the FEDERAL REGISTER and, if it contains a rule or regulation, will specify the effective date thereof, which will not be prior to the ninetieth (90th) day after its publication unless the Commission finds that emergency conditions exist necessitating an earlier effective date, in which event the Commission will specify in the order its findings as to such conditions.

§ 3.55 Reconsideration.

Within fourteen (14) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission. Any party desiring to oppose such a petition shall file an answer thereto within ten (10) days after service upon him of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Commission.

[32 FR 8449, June 13, 1967, as amended at 61 FR 50650, Sept. 26, 1996]

§ 3.56 Effective date of orders; application for stay.

(a) Other than consent orders, an order to cease and desist under section 5 of the FTC Act becomes effective upon the sixtieth day after service, except as provided in section 5(g)(3) of the FTC Act, and except for divestiture provisions, as provided in section 5(g)(4) of the FTC Act.

(b) Any party subject to a cease and desist order under section 5 of the FTC Act, other than a consent order, may apply to the Commission for a stay of all or part of that order pending judicial review. If, within 30 days after the application was received by the Commission, the Commission either has denied or has not acted on the application, a stay may be sought in a court of appeals where a petition for review of the order is pending.

(c) An application for stay shall state the reasons a stay is warranted and the facts relied upon, and shall include supporting affidavits or other sworn statements, and a copy of the relevant portions of the record. The application shall address the likelihood of the applicant's success on appeal, whether the applicant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

(d) An application for stay shall be filed within 30 days of service of the order on the party. Such application shall be served in accordance with the provisions of § 4.4(b) of this part that are applicable to service in adjudicative proceedings. Any party opposing the application may file an answer within 5 business days after receipt of the application. The applicant may file a reply brief, limited to new matters raised by the answer, within 3 business days after receipt of the answer.

[60 FR 37748, July 21, 1995]

Subpart G [Reserved]

Subpart H—Reopening of Proceedings

§ 3.71 Authority.

Except while pending in a U.S. court of appeals on a petition for review (after the transcript of the record has been filed) or in the U.S. Supreme Court, a proceeding may be reopened by the Commission at any time in accordance with § 3.72. Any person subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final may file a request to reopen the proceeding in accordance with § 2.51.

[44 FR 40637, July 12, 1979]

§ 3.72 Reopening.

(a) *Before statutory review.* At any time prior to the expiration of the time allowed for filing a petition for review or prior to the filing of the transcript of the record of a proceeding in a U.S. court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding.

(b) *After decision has become final.* (1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a proceeding, should be altered, modified, or set aside in whole or in part, the Commission will, except as provided in § 2.51, serve upon each person subject to such decision (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

(2) Whenever an order to show cause is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause and answer thereto, if any, or it may serve upon the parties (in the case of proceedings instituted under § 3.13, such service may be by publication in FEDERAL REGISTER) a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by an Administrative Law Judge. Unless otherwise ordered and insofar as practicable, hearings before an Administrative Law Judge to receive evidence shall be conducted in accordance with subparts B, C, D, and E of part 3 of this chapter. Upon conclusion of hearings before an Administrative Law Judge, the record and the Administrative Law Judge's recommendations shall be certified to the Commission for final disposition of the matter.

(3) *Termination of existing orders*—(i) *Generally.* Notwithstanding the foregoing provisions of this rule, and except as provided in paragraphs (b)(3)(ii) and (iii) of this section, an order issued by the Commission before August 16, 1995, will be deemed, without further notice or proceedings, to terminate 20 years from the date on which the order was first issued, or on January 2, 1996, whichever is later.

(ii) *Exception.* This paragraph applies to the termination of an order issued before August 16, 1995, where a complaint alleging a violation of the order was or is filed (with or without an accompanying consent decree) in federal court by the United States or the Federal Trade Commission while the order

remains in force, either on or after August 16, 1995, or within the 20 years preceding that date. If more than one complaint was or is filed while the order remains in force, the relevant complaint for purposes of this paragraph will be the latest filed complaint. An order subject to this paragraph will terminate 20 years from the date on which a court complaint described in this paragraph was or is filed, except as provided in the following sentence. If the complaint was or is dismissed, or a federal court rules or has ruled that the respondent did not violate any provision of the order, and the dismissal or ruling was or is not appealed, or was or is upheld on appeal, the order will terminate according to paragraph (b)(3)(i) of this section as though the complaint was never filed; provided, however, that the order will not terminate between the date that such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal. The filing of a complaint described in this paragraph will not affect the duration of any order provision that has expired, or will expire, by its own terms. The filing of a complaint described in this paragraph also will not affect the duration of an order's application to any respondent that is not named in the complaint.

(iii) *Stay of Termination.* Any party to an order may seek to stay, in whole or part, the termination of the order as to that party pursuant to paragraph (b)(3)(i) or (ii) of this section. Petitions for such stays shall be filed in accordance with the procedures set forth in §2.51 of these rules. Such petitions shall be filed on or before the date on which the order would be terminated pursuant to paragraph (b)(3)(i) or (ii) of this section. Pending the disposition of such a petition, the order will be deemed to remain in effect without interruption.

(iv) *Orders not terminated.* Nothing in §3.72(b)(3) is intended to apply to *in camera* orders or other procedural or interlocutory rulings by an Administrative Law Judge or the Commission.

[32 FR 8449, June 13, 1967, as amended at 44 FR 40637, July 12, 1979; 45 FR 21623, Apr. 2, 1980; 60 FR 58515, Nov. 28, 1995]

Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings

AUTHORITY: 5 U.S.C. 504 and 5 U.S.C. 553(b).

SOURCE: 63 FR 36341, July 6, 1998, unless otherwise noted.

§3.81 General provisions.

(a) *Purpose of these rules.* The Equal Access to Justice Act, 5 U.S.C. 504 (called ''the Act'' in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to adversary adjudicative proceedings under part 3 of this title. The rules in this subpart describe the parties eligible for awards, how to apply for awards, and the procedures and standards that the Commission will use to make them.

(1) *When an eligible party will receive an award.* An eligible party will receive an award when:

(i) It prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the agency was substantially justified will be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought; or

(ii) The agency's demand is substantially in excess of the decision of the adjudicative officer, and is unreasonable when compared with that decision, under all the facts and circumstances of the case. *Demand* means the express final demand made by the agency prior to initiation of the adversary adjudication, but does not include a recitation by the agency of the statutory penalty in the administrative complaint or elsewhere when accompanied by an express demand for a lesser amount.

(b) *When the Act applies.* (1) Section 504(a)(1) of the Act applies to any adversarial adjudicative proceeding pending before the Commission at any time after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date.

(2) Section 504(a)(4) applies to any adversarial adjudicative proceeding pending before the Commission at any time on or after March 29, 1996.

(c) *Proceedings covered.* (1) The Act applies to all adjudicative proceedings under part 3 of the rules of practice as defined in § 3.2, except hearings relating to the promulgation, amendment, or repeal of rules under the Fair Packaging and Labeling Act.

(2) [Reserved]

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adjudicative proceeding in which it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(2) The types of eligible applicants are as follows:

(i) An individual with a net worth of not more than $2 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(iii) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(iv) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(v) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than $7 million and not more than 500 employees; and

(vi) For purposes of receiving an award for fees and expenses for defending against an excessive Commission demand, any small entity, as that term is defined under 5 U.S.C. 601.

(3) Eligibility of a party shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an ''individual'' rather than a ''sole owner of an unincorporated business'' if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(5) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Administrative Law Judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Administrative Law Judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(e) *Standards for awards*—(1) *For a prevailing party:*

(i) A prevailing applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication in connection with the entire adversary adjudication, or on a substantive portion of the adversary adjudication that is sufficiently significant and discrete to merit treatment as a separate unit unless the position of the agency was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact.

(ii) An award to prevailing party will be reduced or denied if the applicant has unduly or unreasonably protracted

the proceeding or if special circumstances make an award unjust.

(2) *For a party defending against an excessive demand:*

(i) An eligible applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication related to defending against the excessive portion of a Commission demand that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision under all the facts and circumstances of the case.

(ii) An award will be denied if the applicant has committed a willful violation of law or otherwise acted in bad faith or if special circumstances make an award unjust.

(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A). No award to compensate an expert witness may exceed the highest rate at which the Commission paid expert witnesses for similar services at the time the fees were incurred. The appropriate rate may be obtained from the Office of the Executive Director. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Administrative Law Judge shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(5) Any award of fees or expenses under the Act is limited to fees and expenses incurred after initiation of the adversary adjudication and, with respect to excessive demands, the fees and expenses incurred in defending against the excessive portion of the demand.

(g) *Rulemaking on maximum rates for attorney fees.* If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may, upon its own initiative or on petition of any interested person or group, adopt regulations providing that attorney fees may be awarded at a rate higher than the rate specified in 5 U.S.C. 504(b)(1)(A) per hour in some or all the types of proceedings covered by this part. Rulemaking under this provision will be in accordance with Rules of Practice part 1, subpart C of this chapter.

§ 3.82 Information required from applicants.

(a) *Contents of application.* An application for an award of fees and expenses under the Act shall contain the following:

(1) Identity of the applicant and the proceeding for which the award is sought;

(2) A showing that the applicant has prevailed; or, if the applicant has not prevailed, a showing that the Commission's demand was the final demand before initiation of the adversary adjudication and that it was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision;

(3) Identification of the Commission position(s) that applicant alleges was (were) not substantially justified; or, identification of the Commission's demand that is alleged to be excessive and unreasonable and an explanation as to why the demand was excessive and unreasonable;

(4) A brief description of the type and purpose of the organization or business (unless the applicant is an individual);

(5) A statement of how the applicant meets the criteria of § 3.81(d);

(6) The amount of fees and expenses incurred after the initiation of the adjudicative proceeding or, in the case of a claim for defending against an excessive demand, the amount of fees and expenses incurred after the initiation of the adjudicative proceeding attributable to the excessive portion of the demand;

(7) Any other matters the applicant wishes the Commission to consider in determining whether and in what amount an award should be made; and

(8) A written verification under oath or under penalty or perjury that the information provided is true and correct accompanied by the signature of the applicant or an authorized officer or attorney.

(b) *Net worth exhibit.* (1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the application and any affiliates (as defined in § 3.81(d)(6)) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, if an applicant objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure, the applicant may submit that portion of the exhibit directly to the Administrative Law Judge in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1) through (9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on complaint counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with § 4.11.

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. With respect to a claim for fees and expenses involving an excessive demand, the application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity

for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(d) *When an application may be filed*—(1) *For a prevailing party:*

(i) An application may be filed not later than 30 days after the Commission has issued an order or otherwise taken action that results in final disposition of the proceeding.

(ii) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(2) *For a party defending against an excessive demand:*

(i) An application may be filed not later than 30 days after the Commission has issued an order or otherwise taken action that results in final disposition of the proceeding.

(ii) If review or reconsideration is sought or taken of a decision as to which an applicant believes the agency's demand was excessive and unreasonable, proceedings for the award of fees and expenses shall be stayed pending final disposition of the underlying controversy.

(3) For purposes of this subpart, *final disposition* means the later of—

(i) The date that the initial decision of the Administrative Law Judge becomes the decision of the Commission pursuant to § 3.51(a);

(ii) The date that the Commission issues an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding; or

(iii) The date that the Commission issues a final order or any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

§ 3.83 Procedures for considering applicants.

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties as specified in §§ 4.2 and 4.4(b) of this chapter, except as provided in § 3.82(b)(2) for confidential financial information. The date the Office of the Secretary of the Commission receives the application is deemed the date of filing.

(b) *Answer to application.* (1) Within 30 days after service of an application, complaint counsel may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the Administrative Law Judge upon request by complaint counsel and the applicant.

(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of complaint counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(c) *Reply.* Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) *Comments by other parties.* Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Administrative Law Judge determines that the public interest requires such participation in order to permit full exploration of matters in the comments.

(e) *Settlement.* The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application. A proposed award settlement entered into in connection with a consent agreement covering the underlying proceeding will be considered in accordance with §3.25. The Commission may request findings of fact or recommendations on the award settlement from the Administrative Law Judge. A proposed award settlement entered into after the underlying proceeding has been concluded will be considered and may be approved or disapproved by the Administrative Law Judge subject to Commission review under paragraph (h) of this section. If an applicant and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

(f) *Further proceedings.* (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the Administrative Law Judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(2) A request that the Administrative Law Judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Decision.* The Administrative Law Judge shall issue an initial decision on the application within 30 days after closing proceedings on the application.

(1) *For a decision involving a prevailing party:* The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(2) *For a decision involving an excessive agency demand:* The decision shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That decision shall be based upon all the facts and circumstances of the case. The decision shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

(h) *Agency review.* Either the applicant or complaint counsel may seek review of the initial decision on the fee application by filing a notice of appeal under §3.52(a), or the Commission may decide to review the decision on its own initiative, in accordance with §3.53. If neither the applicant nor complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the Administrative Law Judge for further proceedings.

(i) *Judicial review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 503(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adjudicative

proceeding has been sought by the applicant or any party to the proceeding.

PART 4—MISCELLANEOUS RULES

AUTHORITY: 15 U.S.C. 46, unless otherwise noted.

§4.1 Appearances.

(a) *Qualifications*—(1) *Attorneys.* (i) U.S.-admitted. Members of the bar of a Federal court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(ii) European Community (EC)-qualified. Persons who are qualified to practice law in a Member State of the European Community and authorized to practice before The Commission of the European Communities in accordance with Regulation No. 99/63/EEC are eligible to practice before the Commission.

(iii) Any attorney desiring to appear before the Commission or an Administrative Law Judge may be required to show to the satisfaction of the Commission or the Administrative Law Judge his or her acceptability to act in that capacity.

(2) *Others.* (i) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf or himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

(ii) At the request of counsel representing any party in an adjudicative proceeding, the Administrative Law Judge may permit an expert in the same discipline as an expert witness to conduct all or a portion of the cross-examination of such witness.

(b) *Restrictions as to former members and employees*—(1) *General Prohibition.* Except as provided in this section, or otherwise specifically authorized by the Commission, no former member or employee (''former employee'' or ''employee'') of the Commission may communicate to or appear before the Commission, as attorney or counsel, or otherwise assist or advise behind-the-scenes, regarding a formal or informal proceeding or investigation[1] (except that a former employee who is disqualified solely under paragraph (b)(1)(ii) or paragraph (b)(1)(iv) of this section, is not prohibited from assisting or advising behind-the-scenes) if:

(i) The former employee participated personally and substantially on behalf of the Commission in the same proceeding or investigation in which the employee now intends to participate;

(ii) The participation would begin within two years after the termination of the former employee's service and, within a period of one year prior to the

[1] It is important to note that a new ''proceeding or investigation'' may be considered the same matter as a seemingly separate ''proceeding or investigation'' that was pending during the former employee's tenure. This is because a ''proceeding or investigation'' may continue in another form or in part. In determining whether two matters are actually the same, the Commission will consider: the extent to which the matters involve the same or related facts, issues, confidential information and parties; the time elapsed; and the continuing existence of an important Federal interest. See 5 CFR 2637.201(c)(4). For example, where a former employee intends to participate in an investigation of compliance with a Commission order, submission of a request to reopen an order, or a proceeding with respect to reopening an order, the matter will be considered the same as the adjudicative proceeding or investigation that resulted in the order. A former employee who is uncertain whether the matter in which he seeks clearance to participate is wholly separate from any matter that was pending during his tenure should seek advice from the General Counsel or the General Counsel's designee before participating.